

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

ENGINEERING CONTRACTORS, INC. AND
ECI OF WASHINGTON, LCC

And

PLUMBERS LOCAL NO. 5, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO	Case 5-CA-36213
--	-----------------

STEAMFITTERS LOCAL 602, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO	Case 5-CA-36214
--	-----------------

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL NO. 100, AFL-CIO	Cases 5-CA-36216 5-CA-36306
--	--------------------------------

ASBESTOS WORKERS LOCAL 24 PENSION FUND, ASBESTOS WORKERS LOCAL 24 MEDICAL FUND, AND ASBESTOS WORKERS LOCAL 24 APPRENTICESHIP FUND, AFFILIATED WITH INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ALLIED WORKERS LOCAL 24. AFL-CIO	Case 5-CA-36225
---	-----------------

**RESPONDENTS EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

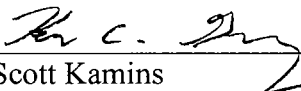
Respondents Engineering Contractors Inc. (“Engineering”) and ECI of Washington (“ECI”) (collectively “Respondents”), by their undersigned counsel, and in accordance with Section 102.46 of the Rules and Regulations of the National Labor Relations Act, hereby submits the following Exceptions to the September 1, 2011, Decision of Administrative Law Judge Bruce D. Rosenstein in the above-referenced matter. In further support of Respondents’ Exceptions, please see the accompanying Brief. Respondents excepts to the ALJ’s Decision as follows:

1. The ALJ’s finding that Engineering and ECI are alter-egos because, in part, they use the same vendors and suppliers.

2. The ALJ's finding that Engineering and ECI are alter-egos.
3. The ALJ's finding that unlawful motivation exists because Griffith never informed the Plumbers, Steamfitters, Asbestos Workers, or the Sheet Metal Workers that he established Respondent ECI.
4. The ALJ's finding that ECI was created explicitly "for the purpose of obtaining non-union work. . . ."
5. The ALJ's finding that Respondent refused to negotiate with the unions.
6. The ALJ's finding that the Respondents violated Section 8(a)(1) and (3) of the Act because Respondents failed to satisfy their burden under the Wright Line test.
7. The ALJ's finding that Respondents refused to provide information requested by the Sheet Metal Workers.

Dated this 28th day of September, 2011

Respectfully submitted,



Scott Kamins
Ken C. Gauvey
Offit Kurman
8171 Maple Lawn Blvd., Suite 200
Maple Lawn, MD 20759
(301) 575-0347 (phone)
(301) 575-0335 (facsimile)
skamins@offitkurman.com

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

ENGINEERING CONTRACTORS, INC. AND
ECI OF WASHINGTON, LCC

And

PLUMBERS LOCAL NO. 5, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO	Case 5-CA-36213
--	-----------------

STEAMFITTERS LOCAL 602, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO	Case 5-CA-36214
--	-----------------

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL NO. 100, AFL-CIO	Cases 5-CA-36216 5-CA-36306
--	--------------------------------

ASBESTOS WORKERS LOCAL 24 PENSION FUND, ASBESTOS WORKERS LOCAL 24 MEDICAL FUND, AND ASBESTOS WORKERS LOCAL 24 APPRENTICESHIP FUND, AFFILIATED WITH INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ALLIED WORKERS LOCAL 24. AFL-CIO	Case 5-CA-36225
---	-----------------

**RESPONDENTS' BRIEF IN SUPPORT OF THEIR
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Respondents Engineering Contractors Inc. ("Engineering") and ECI of Washington, LLC ("ECT"), by its undersigned counsel, hereby submits its Brief in Support of its Exceptions to the September 1, 2011, Decision of Administrative Law Judge Bruce D. Rosenstein in the above-referenced matter, and in support thereof states as follows:

I. BACKGROUND

Engineering Contractors Inc. was a mechanical contractor in the Washington, D.C. metropolitan area. It was founded in 1991, by Steven Griffith. Exhibit GC-37. After forming Engineering, Mr. Griffith brought Paul Parker into the business as a 49% owner. From 1991

until 2008, Engineering bid on projects, performed the work and was successful in the marketplace.

In 2008, Engineering entered into several collective bargaining agreements (“CBAs”). Some of these CBAs were entered into through direct agreements between Engineering and the unions. Others were entered into through the Mechanical Contractors Association of Metropolitan Washington, Inc.

Having been successful for 17 years as mechanical contractor, Steven Griffith and Paul Parker wanted to enter into a complementary business and start a general contractor business under the name of ECI of Washington, LLC. Steven Griffith testified that his background was in general contracting and that ECI was formed to allow him to return to that industry. As a result ECI was formed in December of 2009. Exhibit GC-122. ECI was formed to run jointly with Engineering with Engineering continuing as a mechanical contractor and ECI performing the services of a general contractor. Indeed, Steve Griffith testified that his background was as a general contractor and that he formed ECI in order to get back to doing that kind of work.

Two years after entering into the CBAs, which required Engineering to use certain employees, Engineering was no longer a viable company. Indeed, Paul Parker met with the various union agents and advised them that their cost overruns were making it impossible for Engineering to continue as a business entity. The unions each individually refused to negotiate any changes to the agreements in order to permit Engineering to survive. Indeed, the business managers blamed the cost overruns on poor estimating, ignoring that Engineering was successful for the 17 years prior to entering into agreements requiring the use of certain employees. After being successful for 17 years, Engineering was driven out of business within two years of entering into the CBAs.

Though Engineering was defunct, ECI was still viable. Engineering effectively ceased operations on May 7, 2010. Most of the work contracted by Engineering was turned over to bonding companies who finished the jobs. *See* Exhibit R-1. Those jobs that were not bonded were turned over to various other contractors. ECI received some of the general contracting work.

After Engineering ceased operations, Counsel to the Sheet Metal Workers sent a letter requesting information about Engineering and ECI. Since these proceedings began, all information requested has been provided to the Sheet Metal Workers.

II. ARGUMENT

A. The ALJ improperly found that ECI was the alter-ego of Engineering because they used the same vendors and suppliers.

The ALJ's finding that an alter-ego exists because both respondents used some of the same vendors and suppliers is improper. Indeed, repeated and undisputed testimony demonstrated that there are only ten or so vendors and suppliers in the Washington, D.C. metropolitan area. The fact that both Respondents used, in common, four or five of those suppliers cannot possibly lead to even an inference of the existence of an alter-ego. Under that standard, every contractor or subcontractor in the D.C. Metropolitan area would be considered the alter-ego of Engineering. The ALJ's gave improper weight to the existence of similar vendors and suppliers in determining the existence of alter-egos and, therefore, the ALJ's decision should be overruled. *See e.g. Magaha v. Astrue*, 2011 U.S. Dist. LEXIS 102715, 20-21 (D. Md. Sept. 9, 2011) (overturning the decision of an ALJ where the ALJ gave improper weight to one of the considerations at issue).

B. The ALJ improperly found that ECI was the alter-ego of Engineering when ECI was formed months before Engineering ceased operations for reasons other than anti-union animus.

A key factor in finding alter-ego status is whether the new company has different business purposes and was formed in order to evade responsibilities under the Act. *Chariot Marine Fabricators & Industrial Corp.*, 335 N.L.R.B. 339, 352 (N.L.R.B. 2001) (“ . . . the Board also considers in determining alter ego status whether the two enterprises have the same business purpose and whether the alter ego was created in order to evade responsibilities of the Act.”). There is no evidence of anti-union animus being a factor in the formation of ECI or that ECI was formed to avoid responsibilities under the Act. Indeed, ECI was formed five months before Engineering ceased operations. Exhibit GC-122. Moreover, Mr. Griffith testified that ECI was formed to perform services that were substantially different than those services performed by Engineering. The testimony of Mr. Griffith further elaborated that ECI was formed as a means for Mr. Griffith to return to the area of general contracting. As such, ECI was formed as a general contractor, who, by nature would hire mechanical subcontractors to perform the type of work performed by Engineering. The ALJ failed to even address this testimony and cannot point to any anti-union animus as a motivating factor in the creation of ECI of Washington, LLC.

C. The ALJ improperly found that Engineering failed to attempt to negotiate with the unions.

The ALJ’s determination that Engineering refused to negotiate was in error. The various business agents, as well as Paul Parker, testified that Mr. Parker met with the business agents and asked them to work with Engineering to help Engineering survive. The unions refused to discuss modifying the agreements. Engineering made every attempt to negotiate with the unions and was rebuffed.

D. Respondents satisfied their obligations under the *Wright Line* test because Respondents demonstrated that the employees would have been terminated when Engineering ceased operations regardless of their status as union members.

In Section 8(a)(3) and 8(a)(1) allegations, the General Counsel must demonstrate that interference with protected conduct was a “motivating factor” in the employer’s decisions.

Wright Line, 251 NLRB 1083 (1980). The testimony from Paul Parker and Steven Griffith, which was not contradicted, indicated that Engineering was no longer a viable company. Indeed, Engineering was forced out of business and laid off its entire workforce, with the exception of individuals involved in accounts receivable. It cannot be questioned that when a company ceases operations that the workforce employed therein will be terminated off regardless of their union affiliation.

E. Respondents satisfied their obligations under the *Wright Line* test because Respondents demonstrated that the employees would have been terminated for poor work performance.

The Board has accepted that an employer satisfies their *Wright Line* burdens when the employer demonstrates that employees were terminated for poor performance. *Intermet Stevensville*, 350 N.L.R.B. 1349, 1358 (N.L.R.B. 2007). The testimony by Paul Parker and Steve Griffith during the trial in this matter, which was not challenged by any witness put on by the general counsel and indeed was corroborated by several witnesses, was that the employees on the job site were performing substandard work, using the job site to train individuals who were not properly certified to do the work or simply doing no work at all. As a result, the significant cost overruns caused by these employees caused Engineering to go out of business and provided a tremendous disincentive to ECI to hire these employees.

F. The information sought by the Sheet Metal Workers has been provided.

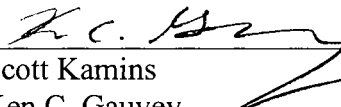
Throughout the course of these proceedings, all the materials requested by the Sheet Metal Workers have been provided. Indeed, the Sheet Metal Workers are part of the federal litigation in this matter. All materials requested in the letter sent by the Sheet Metal Workers were requested in discovery and were provided.

III. CONCLUSION

For these and all of the foregoing reasons, the General Counsel has failed to meet its burden of establishing that Respondents engaged in unlawful conduct. As such, Respondents respectfully requests that their Exceptions be granted, and that the Complaint be dismissed with prejudice.

Dated this 28th day of September, 2011

Respectfully submitted,



Scott Kamins
Ken C. Gauvey
Offit Kurman
8171 Maple Lawn Blvd., Suite 200
Maple Lawn, MD 20759
(301) 575-0347 (phone)
(301) 575-0335 (facsimile)
skamins@offitkurman.com

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

ENGINEERING CONTRACTORS, INC. AND
ECI OF WASHINGTON, LCC

And

PLUMBERS LOCAL NO. 5, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO	Case 5-CA-36213
--	-----------------

STEAMFITTERS LOCAL 602, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO	Case 5-CA-36214
--	-----------------

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL NO. 100, AFL-CIO	Cases 5-CA-36216 5-CA-36306
--	--------------------------------

ASBESTOS WORKERS LOCAL 24 PENSION FUND, ASBESTOS WORKERS LOCAL 24 MEDICAL FUND, AND ASBESTOS WORKERS LOCAL 24 APPRENTICESHIP FUND, AFFILIATED WITH INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ALLIED WORKERS LOCAL 24. AFL-CIO	Case 5-CA-36225
---	-----------------

STATEMENT OF SERVICE

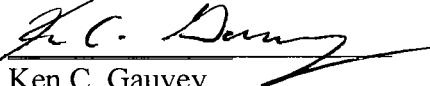
I HEREBY CERTIFY that on this 28th day of September, 2011, I sent a copy of
Respondents' Exceptions and Memorandum of Law in Support of Respondents' Exceptions to
the following parties via Federal Express, Overnight delivery:

Sean R. Marshall
Counsel for the Acting General Counsel
National Labor Relations Board, Region 5
103 S. Gay Street, 8th Floor
Baltimore, MD 21202
Sean.marshall@nrlrb.gov

Mr. Keith Bolek
O'Donoghue and O'Donoghue LLP
4748 Wisconsin Avenue, NW
Washington, D.C. 20016
kbolek@odonoghuelaw.com

Ms. Mayoung Nham
Mooney, Green, Saindon, Murphy & Welch
Suite 400
1920 L. Street, NW
Washington, D.C. 20036
mnham@mooneygreen.com

Mr. John Newman
Sherman, Dunn, Cohen, Leifer & Yellig
900 Seventh Street, N.W. Suite 1000
Washington, D.C. 20001
newman@shermardunn.com


Ken C. Gauvey

RECEIVED

2011 SEP 29 AM 11:36

ALRB
ORDER SECTION